IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.66 OF 1993

1. Mariambibi U. Deshmukh
   (deceased)

2. Hasankhan Ibrahimkhan Deshmukh
   adult, Occ: Business,
   R/o. Pakistan Karachi.

3. Allikhand Ibrahim Deshmukh,
   adult, Occ: Service,
   P.B.No.330, Dara Salem,
   East Africa. ..Appellants
   (Org.Plaintiff Nos.1 to 3)

versus

1. Munwarkhan Dawoodkhan Deshmukh
   (dismissed)

2. Rabiyabibi Javje Allikhan Deshmukh
   (deceased) through heirs

2/1. Allikhan Ahmedkhan Deshmukh
     (name deleted)

2/2. Hasankhan Uplikhan Deshmukh,
     adult, Occ: Service,
     R/o. Morbe, Tal : Mangaon,
     Dist: Raigad.

2/3. Ahmadkhan Allikhan Deshmukh,
     adult, Occ: Service,
     Res. of Beharan,
     P.B.No.5503.

2/4. Hamidkhan Allikhan Deshmukh,
     adult, Occ: Service,
     R/o. Tudil, Tal : Mahad,
     Dist: Raigad.

2/5. Ibrahimkhan Allikhan Deshmukh,
     adult, Occ: Service,
     R/o. Nate, Tal: Mahad,
     Dist: Raigad.

2/6. Ohrabi Abdullah Desai,

adult, Occ: Household work,
R/o. Rukhikost, Dapoli,
Dist: Ratnagiri.

3. Havabibi Javje Ibrahimkhan Deshmukh,
adult, Occ: Household work,
res. of Tudil (Upper),
Tal : Mahad, Dist: Raigad.

4. Khadijabibi Javje Ibrahimkhan Deshmukh,
since deceased through heirs

4/1. Ibrahimkhan Sahabuddinkhan Deshmukh,
husband.

4/2. Nazir Ibrahimkhan Deshmukh,
son,

4/3. Safinabi Iqbalkhan Deshmukh,
daughter

R/o. Tudil (Upper),
Tal : Mahad, Dist : Raigad,

5. Ahmadkhan Mohammedkhan Deshmukh,
Adult, Occ: Agriculture,
R/o. Tudil (Upper),
Tal : Mahad, Dist: Raigad.

6. Umarkhan Mohammadkhan Deshmukh,
Occ : Service, R/o. Bombay.
Bombay Municipal Corporation,
Education Provident Fund Department,
2nd floor, Mahapalika Marg,
Mumbai 400 001.

7. Daudkhan Mohammedkhan Deshmukh,
Occ: Service, R/o. Bombay
Baloplast Pvt. Ltd, Lagan Assembali
Dept., Card No.5, Bhandup Rly. Stn Road,
Mumbai 400 078.

8. Mariambibi Javje Hasankhan Deshmukh,
Occ: Household, res. of Tudil (Upper)
Tal : Mahad, Dist: Raigad.

9. Afsari Begum Mohammedkhan Deshmukh,
adult, R/o. Tudil (Upper),
Tal : Mahad, Dist: Raigad.

10. Raima Begum Mohammedkhan Desumukh,
adult, R/o. Tudil (Upper)
Tal: Mahad, Dist: Raigad.

11. Mumtaz Begum Mohammadkhan Deshmukh,
adult, R/o. Tudil (Upper),
Tal: Mahad, Dist: Raigad.

12. Khadijbibi Mohamadkhan Deshmukh,
adult, Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

13. Rabiyabibi Mohamadkhan Deshmukh,
adult, Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

14. Fahmida Begum Mohammedkhan Deshmukh,
adult, Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

15. Fatimabibi Javje Mohammedkhan Deshmukh,
adult, Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

..Respondents
(Org.Defendants
Nos.6 to 20)

16. Ahmadkhan Allikhan Deshmukh
adult, Occ: Service, R/o. Bombay.
B.S.I. Office, Dadasaheb Falke Road,
Dadar Kabutarkhand, Dadar,
Bombay 400 028.

17. Shahabuddin Allikhan Deshmukh,
adult, Occ: Service,
adult, Res. of Tudil,
Tal : Mahad, Dist : Raigad.

18. Umarkhan Maswudkhan Deshmukh
adult, Occ: Service, R/o. Africa,
Through Mrs. Zora M.A. Khan,
P.B.No.20013,
Tanzaniya, East Africa.
(deceased through legal heirs)

18/1. Fatimabibi Javje Mahommadkhan Deshmukh,
adult, Occ: Service
Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

19. Ahmadkhan Maswudkhan Deshmukh,
since deceased through legal heirs

See heirs of Resondent No.18.

20. Mariambi Javje Umarkhan Deshmukh,
since deceased through legal heirs
See heirs of Respondent No.18.

21. Ibrahimkhan Shabuddinkhan Deshmukh
(name deleted)

22. Aishabibi Javje Abdulhamidkhan Deshmukh,
(since deceased through legal heirs)

22/1. Abdul Hamidkhan Mohmad Ibrahimkhan
(name deleted)

22/2. Abdullakhan Hamidkhan Deshmukh.
Occ: Service, R/o.Adanwala Cross Lane,
2nd floor, Room No.25,
Bombay 8.

22/3. Mohamad Ibrahimkhan Abdul Hamidkhan Deshmukh,
adult, Occ: Service,
R/o. Maharashtra College of Arts
ans Science, Belasis Road,
Bombay 400 008.

22/4. Mahmudkhan Abdul Hamidkhan Deshmukh,
adult, Occ: Service, C.M.P. Office,
2nd floor, Lion Gate,
Naval Dock Yard, Bombay 400 001.

22/5. Liyakat Allikhan Abdul Hamidkhan
Deshmukh, adult, Occ: Eduction,
(R/o. Adanwala Building, 2nd floor,
Room No.25, 24/26 Mastan Tank
Cross Line, Bombay 400 008)
Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

22/6. Havabegum J. Mohamad Sadula,
adult, Occ: Household, 303 Rajab
Alli Square Nagazin Line of
Victoria Road, Sadar Karachi,
Pakistan. (dismissed)

22/7. Banu Begum J. Shahabuddin Khan Deshmukh,
adult, Res. of Tudil (Upper),

Tal : Mahad, Dist : Raigad.

23. Abdul Gafurkhan Mahamadkhan Deshmukh,
Occ: Agriculture,
adult, Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

24. Daudkhan Mahmudkhan Deshmukh,
adult: Occ; Service,
Rationing Inspector,
Kalyan, Dist: Thane.

25. Kulsumbibi Javje Umarsaheb Kauchali,
adult, Occ: Household, R/o.Tempala
Tal : Mangaon, Dist: Raigad.

26. Fatimabibi Javje Mahmadkhan Deshmukh,
adult, Occ: household,
Res. of Tudil (Upper),
Tal : Mahad, Dist : Raigad.

27. Rabiyabibi Javje Mahamudkhan Deshmukh
(deleted)

28. Hasanmiya Jasinuddin Chafekar,
adult, Occ: Service, R/o. Africa,
Through Power of Attorney-Allisaheb
Bapu Chaphekar, adult, R/o. Narayan,
Post-Tudil, Tal: Mahad,
Dist: Raigad.

29. Fatimanini Javje Munwarkhan Deshmukh
since deceased by legal heirs

29/1. Abdul Sattar Munnawar Khan.
29/2. Abdul Jabbar Munnawar Khan.
29/3. Khadija Rabiya Munnawar Khan.
29/4. Rabiya Munnawar Khan.
29/5. Farhat Munnawar Khan.

all major, R/o. A-II,
74 Nawaz Court,
F.B.Area, Waterpump,
Karachi 38,
Pakistan.

30. Khadinabibi Alikhan Deshmukh
(since decesed through heirs)

30/1. Allikhan Ibrahimkhan Deshmukh (deleted)

30/2. Sharifa Ahmadkhan Deshmukh (deleted)
30/3. Mohomadkhan Allikhan Deshmukh.
c/o. Allikhan Ibrahimkhan Inatkhan,
P.B. No.15220, Darusalam,
Tanzaniya, East Africa. .. Respondents
(Org. Defendants 22 to 30)

Mr.Raju Patil for the Appellant.
Mr. Gorwadkar for the Respondent

Coram : S.R.Sathe, J.
Dated : 3rd February, 2006

ORAL JUDGMENT

1. Appellants, the original plaintiffs in Civil Suit No.63 of 1971 have preferred this second appeal against the judgment and order passed by the court of 3rd Additional District Judge, Raigad in Civil Appeal No.3 of 1985, whereby the order passed by the Court of CJJD Mahad, decreeing the plaintiff's suit for redemption was set aside and the suit was dismissed being barred by law of limitation. (For the sake of convenience, hereafter the parties shall be referred to as plaintiffs and defendants).

2. Brief facts giving rise to this appeal are as under:

. The suit properties bearing survey No.52/5 and 45/1 situated at Village Tudial, Taluka Mahad were mortgaged by the owner of the said property

namely Ibrahim Khan Imtehand Khan to Ahmed Khan Hamid Khan and his brother Dawood Khan Hamid Khan for Rs.2000/- on 20.2.1923. The period of mortgage was five years and income of the property was to be appropriated by the mortgagees towards interest. Thus, it was Usufructuary mortgage. During the period of five years the property was not redeemed but on 27.1.1945 one of the mortgagees namely Dawood Khan Hamid Khan sub-mortgaged the suit property to one Chaphekar and in the said deed he acknowledged the earlier mortgage. The original defendants 1 to 27 are the heirs of the said Ahmed Khan and Dawood Khan. Defendant No.28 is the heir of deceased Jayant Chaphekar. On 2.11.1971 the plaintiffs filed suit for redemption of mortgage against the defendants and alleged that as the initial mortgage was acknowledged by Dawood Khan while creating sub-mortgage the suit is in time.

3. During the pendency of the suit Defendant Nos.3, 4, 5, 7, 22 and 30 died. Their heirs were brought on record. Though all the defendants were served except defendant Nos.2, 11 and 13 to 20 and No.28 nobody else filed the written statement. The Defendant No.2 filed his written statement at

Exhibit 103 and admitted the plaintiffs suit. He contended that Dawood Khan has sub-mortgaged the property of his share to Chaphekar, but did not hand over the possession and contended that he be given his share in the mortgage amount.

4. The defendant No.28 filed his written statement at Exhibit 33 and supported the plaintiffs claim.

5. The defendant No.11 filed his written statement at exhibit 45 and contended that the original mortgagor Ibrahim Khan has not died. For many years he was of unsound mind and he was lastly seen in the year 1968. The defendant therefore contended that Plaintiffs who have filed the suit as heirs of Ibrahim Khan are infact not entitled to file the suit. They have also contended that the suit is barred by law of limitation.

6. On these pleadings the learned trial judge framed issues. Both the parties adduced oral as well as documentary evidence. After considering the said evidence the learned trial judge came to the conclusion that the sub-mortgage executed by Dawood

Khan on 27.1.2005 amounts to acknowledgement of the earlier mortgage and as a result of the same the period of limitation is saved and as such the suit is maintainable. The learned Judge also held that Dawood Khan was entitled to sub-mortgage the property to the extent of his share. He, therefore, directed the defendants to hand over 13/20 share in the suit property to plaintiff and before that plaintiff should deposit Rs.1300 in the court for paying the said amount to defendant Nos.6 to 20.

7. Being aggrieved by the said judgment and order the original defendants 6 to 20 filed Civil Appeal No.3 of 1985. After considering the arguments advanced by both the sides the learned First Appellate Judge came to the conclusion that the document dated 27.1.1945 can not be said to be an acknowledgement of earlier mortgage and it does not save the limitation. He also held that as the present suit is not filed within 30 years from the cause of action, the same is barred by law of limitation. Naturally, he allowed the appeal and dismissed the plaintiffs suit. The above mentioned order is challenged by the original plaintiff. While admitting the appeal on 22.3.1993. This Court

(Coram : Dudhat, J.) passed the following order:

"Admit.
Ground Nos.3, 4 and 5 substantial question of law."

Grounds nos.3 4 and 5 are as under:

3. The substantial question of law involved in this appeal is that whether the suit is within the Limitation as construed under Section 18 of the Limitation Act taking into view the acknowledgement of mortgage of the year 1923 by sub-mortgaged in the year 1945.;

4. The substantial question of law involved in this appeal is that whether the rights of redemption is essence and inherent in the transaction of mortgage under Section 18 of Limitation Act.

5. The substantial question of law involved in the appeal is that whether any jural relationship subsisted with the

sub-mortgagee and the mortgagor. The learned 3rd Additional District Judge has not dealt with the Cross objection of the plaintiffs;

In this appeal before me, Shri Patil, learned Advocate for the Plaintiffs has urged two points. Firstly, he submitted that the First Appellate Court has not properly construed the document dated 27.1.1945 and wrongly held that the recitals in the same can not be treated as acknowledgement of the original mortgage dated 20.2.1923. According to him, in view of the provisions of Section 18 of the Limitation Act, 1963, the suit is in time. Secondly, he canvassed before me that the trial judge had rightly held that the subsequent deed executed on 27.1.1945 is admissible in evidence and Dawood Khan, one of the mortgagees was entitled to sub-mortgage the property of his share. He, therefore, submitted that the appeal be allowed and order passed by the First Appellate Court be set aside and the suit be decreed in plaintiff’s favour.

8. As against this, Shri Gorwadkar, learned Advocate for the Defendants Nos.2/2, 2/3, 2/4, 2/5,

3, 4/3, 7 to 11, 14 and 15 supported the judgment and order passed by the first appellate Judge.

9. The relationship between the parties is not in dispute. It is also admitted that initially Ibrahim Khan had executed the mortgage deed of the suit property in favour of Ahmed Khan and Dawood Khan on 20.2.1923. Admittedly, the period of mortgage mentioned in the said deed was of five years. So, if we only take into consideration the said mortgage deed then the suit for redemption filed by the plaintiffs on 2.11.1971 is certainly barred by law of limitation as the same is not filed within 30 years as required by Article 61 of the limitation Act.

10. According to the plaintiffs, on 27.1.1945 one of the mortgagees namely Dawood Khan executed the deed of sub-mortgage in respect of property of his share in favour of one Chaphekar and in that he had acknowledged the liability under the earlier mortgage and as such by virtue of the provisions of Section 18 of the limitation Act, the suit filed on 2.11.1971 was in time as it was within a period or 30 years from the date of acknowledgement i.e.

27.1.1945. Naturally, we have to see whether this stand of the plaintiff is legal and correct.

11. In order to answer the above question correctly, it would be worthwhile see what Section 18 of the limitation Act says. It runs as follows:

> **18. Effect of acknowledgement in writing**- (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.
>
> (2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed, but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

From the bare reading of this section it is very clear that for application of this Section following conditions must be fulfilled.

1) An admission or acknowledgement

2) That such acknowledgement must be in respect of a

liability in respect of the property or right.

3) That it must be made before the expiry of the period of limitation and

4) That it should be in writing and signed by the party against whom such property or right is claimed. Under the explanation, such acknowledgement need not specify the exact nature of the property or the right claimed. It is manifest that the statement relied on must amount to admission or acknowledgment and that acknowledgement must be in respect of the property or right claimed by the party relying on such a statement.

12. The learned Advocate for the plaintiffs argued before me that while deciding whether a particular writing amounts to acknowledgment or not, the statement therein is to be construed liberally. In order to substantiate this proposition he has placed reliance on a case **Food Corporation of India vs. Assam State Co-opertive Marketing (2004) 12 SCC 360.** In this authority their Lordships have observed :

> "The acknowledgement in writing must indicate existence of jural relationship such as that of Debtor and Creditor between the parties.
>
> ..... Once admission acknowledging the jural relationship and existence of liability is made, it is immaterial that the admission is accompanied by assertion that nothing would be found due from the maker of the admission or some amount would be payable to him by the person to whom the statement was made."

The above proposition is not disputed and cannot be disputed. However, the facts of the said case and the case in hand are different. In that case, several letters were written by the respondent to appellant acknowledging receipt of certain amount as advance or deposit and those letters were clearly indicating the relationship of creditor and debtor. Having regard to specific letters and the statements therein it was held that the statement in the said letters amount to acknowledgement. Similarly, the learned Advocate for the plaintiffs has placed

reliance on another case **Ajit Singh Vs. Kripalsingh AIR 2003 Punjab & Haryana 209** wherein also having regard to peculiar facts it was held that there was an acknowledgement of the old mortgage in the subsequent mortgage deed. The learned Advocate has also laid his hands on a case Shapoor Freedoom Mazda vs. Durga Prosad Chamaria & Ors., wherein their Lordships have observed that in order to bring a particular statement under Section 18 of Limitation Act, 1908 the acknowledgement must admit jural relationship of debtor and creditor and it was further observed that such admission may be implied and surrendering circumstances have to be considered while construing the document. This proposition is also not disputed and cannot be disputed. Thus, the main issue is whether the document in question or the statement in question made in the subsequent sub mortgage deed dated 27.1.1945 amounts to acknowledgement or not, under Section 18 of the limitation Act, 1963. The plaintiff is relying on the following statement in the said document dated 27.01.1945 which is at Exhibit 198. It reads as follows :

The above mentioned statement means that the amount of Rs.700/- is received by the executant and for that the property whichis mortgaged is the property which is taken by him and his brother under the mortgage deed executed on 20.02.1923 for Rs.2000/- from Ibrahim Khan Inayak Khan Deshmukh. So, the main question is whether this statement amounts to acknowledgement. The learned Advocate for the defendants argued before me that this statement in fact can not be considered in evidence because the original deed dated 27.1.1945 was not produced and only certified copy of the said deed was produced and mere production of that certified copy was not sufficient to hold that execution of the said document was duly proved.

13. From the perusal of the judgment of the trial court is appears that this document has been admitted and read in evidence as secondary evidence. The learned trial Judge has observed that the document being of 30 years old, as per the provisions of Section 90 of the Evidence Act reliance can be placed on the statement in the said document. However, the learned Advocate for the defendants has drawn my attention to a case **Kalidindi Venkatta Subbaraju and others vs. Chintalapati Subbaraju and others AIR 1968 Supreme Court 947**, wherein their Lordships have observed that

> "production of copy of Will purporting to be 30 years old does not warrant presumption of its execution or attestation. Presumption under Section 90 arises in respect of original document." In view of the abvoe, under the circumstances of the present case, it has to be held that though the document was admitted in the evidence as secondary evidence, the contents of the same were not duly proved by the party and as such plaintiff was in fact not entitled to rely

on the same.

14. Assuming for the sake or argument that plaintiff can rely on the said document, let us find out whether the statement mentioned above falls within the purview of Section 18 of Limitation Act, 1963. From the bare reading of the above mentioned statement it does not appear that there is an admission of jural relationship of the mortgagor and mortgagee given by one of the mortgagee namely Dawood Khan. Question arises whether the above statement by itself is sufficient to constitute an acknowledgement under Section 18 of the Limitation Act. One may argue that when the person is acknowledging that under a mortgage deed he has received a particular property and he is sub-mortgaging it, then impliedly it means that he is admitting the existence of earlier mortgage. The question is it can be said that by making such statement the mortgagee has admitted the liability or whether it is only a statement of mentioning jural relationship without anything more. Even my first impression after reading the above statement is that if one of the mortgagees in the subsequent document dated 27.1.1945 has said that he holds the

property under Kabje Gahan Khat (Mortgage Deed) then it must be said that he is accepting the existence of the said jural relationship and consequently all the responsibilities, liabilities assigned to said jural relationship. It is not necessary again to say that it is therefore liable to be redeemed. This is particularly when it is said that acknowledgement need not be in very express terms but it may be implied. However, it appears that such thinking or process of reasoning is labelled as an "involved" or a "farfetched" process of reasoning. In a case Tilak Ram & Others vs.Nathu & Others AIR 1967 Supreme Court 935, t6o which my attention is drawn by the lerned Advocate for the defendants, wherein in identical circumstances the Apex Court has made following observations:

> "The right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning.
>
> The said mortgage thus is set out for showing the nature of the interest which he

> was mortgaing as security for the said debt of Rs.200 rather than for admitting the mortgage of 1861 as subsisting mortgage.
>
> These statements were clearly made for the purpose of describing his own rights which he was selling under this deed. But there is nothing in this document to show that he referred to the said mortgages with the intention of admitting his jural relationship with his mortgagors and, therefore, of his subsisting liability as the mortgagee thereunder of being redeemed."

15. From the perusal of the said authority it is very clear that the facts of the said case and the facts of the case in hand are quite identical. In that case also there were as many as four documents in which mortgagee had accepted the jural relationship of mortgagor and mortgagee. That was also a case where the mortgagee had created sub mortgage wherein there was reference regarding the earlier mortgage. Thus, we find that the facts of the above cited ruling and the facts of the case in hand are identical and the Apex Court has taken a particular view as mentioned above. Under such circumstances, there is no other go but to hold in the present case also that the statement in question does not amount to acknowledgement as contemplated under Section 18 of the Limitation Act, 1963.

16. There is another important aspect of the matter. Admittedly, the initial mortgage dated 20.2.1923 was created in favour of Ahmed Khan and Dawood Khan while the document dated 27.1.1945 i.e of sub-mortgage was executed only by Dawood Khan. Shri Gorwardkar, the learned Advocate for the Defendant therefore argued that the said document or the relevant statement in the said document can by no stretch of imagination be treated as an acknowledgement of the mortgagees who were party to the earlier document. He has therefore placed reliance on a case **Mawasi Raje Ram vs. Mst. Manbhari AIR 1964 Punjab 226** wherein the Division Bench of Punjab High Court has observed

> "An acknowledgement of the right of redemption in order to save limitation should be made by all the mortgagees where there was one single mortgage in favour of several mortgagees. In such a contingency an acknowledgement signed by one only of them, even though the several mortgages were recorded to have a definite share each, would not hold good even with regard to the share of him who had signed it as a mortgagee was indivisible and would not save the bar of limitation for suit for redemption especially to when there was neither allegation nor any proof respecting the splitting up of the mortgage by any act of the mortgagee.

I am in respectful agreement with the above the

above observations. Such position shall have to be admitted, once it is said that the transaction of mortgage is indivisible. Besides this if we accept that in one mortgage transaction which is in favour of several mortgagees, only one of them can subsequently deal with it or contend that he was having particular share in the said property then situation may arise, when in order to gain himself in particular manner he may join hands even with the mortgagor or anybody else and make some statement in respect of the mortgage transaction which is in fact not created only in his favour. One may say that in such a case the acknowledgement would bind only the mortgagee who has made the said acknowledgement. But if it appears that there is nothing on record to indicate that the mortgagee who has made the acknowledgement is having any particular share in the transaction in question, then it has to be held that there is no acknowledgement at all vis-a-vis the original transaction in which there is unity of estate. So, looking to the present case from this angle, it is clear that the statement in question cannot be regarded as an acknowledgement under Section 18 of the Limitation Act.

17. In view of the above, it is clear that the First Appellate Court has rightly held that the suit filed by the plaintiff was barred by law of limitation.

18. Hence, there is no substance in this appeal. The appeal is dismissed.

. Under the circumstances of the case, parties to bear their own cost.

(S.R.Sathe, J.)

For the reasons recorded separately, following order is passed.

. The appeal is dismissed.

. Under the circumstances, of the case the parties to bear their own cost.

(S.R.Sathe, J.)